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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1842

NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioner,*

v.

HOME BOX OFFICE, INC., ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING THE WRIT	
I. The Lower Court's Decision Seriously Impairs the Ability of the FCC to Fulfill Its Statutory Responsibilities	11
II. The Lower Court's Holding That the Commission Lacked Jurisdiction to Adopt Anti-Siphoning Rules Applicable to Cable Television Conflicts With Prior Decisions of This Court and the Lower Court Itself	14
III. The Lower Court Improperly Substituted its Judgment for That of the Commission and Applied A Standard of Review which Conflicts with Prior Supreme Court and Appellate Court Decisions	19
IV. The Lower Court's Decision Conflicts with Various Appellate Court Decisions Regarding the First Amendment Rights of Cable Television Systems and with This and Other Court's Decisions Regarding the Commission's Authority to Impose Content Regulation on Cable Origination Programming	23
CONCLUSION	27

TABLE OF AUTHORITIES

CASES: Page

Black Hills Video Corp. v. *Federal Communications Commission*, 399 F. 2d 65 (8th Cir. 1968) 25, 26

Buckeye Cablevision, Inc. v. *Federal Communications Commission*, 387 F. 2d 220 (D. C. Cir. 1967) 25, 26

Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 (1962) 21

Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 (1971) 20

City of Chicago v. *Federal Power Commission*, 458 F. 2d 731 (D. C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972) 20

Conley Electronics Corp. v. *Federal Communications Commission*, 394 F. 2d 620 (10th Cir. 1968), *cert. denied*, 393 U.S. 858 (1968) 25, 26, 27

Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) 12

National Association of Regulatory Utility Commissioners v. *Federal Communications Commission*, 533 F. 2d 601 (D. C. Cir. 1976) 13

National Association of Theatre Owners v. *Federal Communications Commission*, 420 F. 2d 194 (D. C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970) ..5, 13, 14, 16, 17, 18, 22, 26

National Broadcasting Company v. *United States*, 319 U.S. 190 (1943) 12, 18

United States v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972) 20

United States v. *Midwest Video Corp.*, 406 U.S. 649 (1972) 6, 14, 15, 18, 19, 24

United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 12, 13, 14, 15, 19, 21, 23, 24

STATUTES:

Administrative Procedure Act, 60 Statute 237, as amended, 5 U.S.C. § 706 (2) (A) 19

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151, *et seq:*
47 U.S.C. § 151 .....11, 14, 15
47 U.S.C. § 152(a) 12
47 U.S.C. § 303(g) 11, 15
47 U.S.C. § 307(b) 11

FCC ORDERS: Page

First Report and Order in Docket No. 18397, 20 F.C.C. 2d 201 (1969) 6, 15

First Report and Order in Docket Nos. 19554 and 18893, 52 F.C.C. 2d 1 (1975) ..... *passim*

Fourth Report and Order on Subscription Television, 15 F.C.C. 2d 466 (1968) 4

Memorandum Opinion and Order in Docket No. 18397, 23 F.C.C. 2d 825 (1976) 6, 17, 22

Notice of Proposed Rulemaking and Notice of Inquiry in Docket 18397, 15 F.C.C. 2d 417 (1968) 5

Notice of Proposed Rulemaking and Memorandum Opinion and Order in Docket No. 19554, 35 F.C.C. 2d 893 (1972) 7

Report and Order in Docket No. 18893, 34 F.C.C. 2d 271 (1972) 5

Second Report and Order on CATV, 2 F.C.C. 2d 725 (1966) 15

FCC RULES AND REGULATIONS:

47 C.F.R. § 76.5(a) 26

MISCELLANEOUS:

Television Factbook, Services Volume, No. 46 (1977) 4

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The National Association of Broadcasters (NAB) respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 25, 1977.[1]

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been officially reported. The full text of the court's opinion is printed in Appendix A to the Petition for Writ of

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[1] The case below consisted of fifteen consolidated petitions for review of orders of the Federal Communications Commission. Petitioner brought the petition for review in No. 75-1785.

Certiorari filed by the Federal Communications Commission (FCC or Commission) in these cases on June 3, 1977, *sub. nom. Federal Communications Commission* v. *Home Box Office, Inc., et al.* (No. 76-1724). The orders of the FCC are reported at 52 F.C.C. 2d 1 (1975) and 54 F.C.C. 2d 797 (1975) (FCC App. C and D). For convenience, references herein will be to the Commission's Appendices ("FCC App.").

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1977 (FCC App. G at 243-246). A partial stay of mandate was granted by the Court of Appeals on May 4, 1977 (FCC App. H at 247-249). This petition for certiorari is being filed within the time allowed by this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the Commission lacked jurisdiction to regulate pay cable origination programming voluntarily undertaken by cable systems which also retransmit broadcast signals.

2. Whether the court below erred in holding that regulations applicable to pay cable origination programming were violative of the First Amendment.

3. Whether the Court of Appeals improperly usurped the Commission's role as an expert agency, improperly substituted its judgment for that of the Commission, and applied an incorrect standard of review in demanding a clear showing of existing harm rather

than permitting the Commission to plan in advance of foreseeable events.[2]

STATUTES INVOLVED

Pertinent provisions of the Communications Act of 1934, as amended, are set forth in FCC App. I at 251-252.

STATEMENT

This petition seeks review of an opinion (FCC App. App. A at 1-116) and judgment (FCC App. G at 243-246) setting aside regulations of the Federal Communications Commission applicable to pay cable television. The rules were adopted for the purposes of maintaining "the public's ability to receive the informational and entertainment programming now provided by conventional television at no direct cost" and encouraging "development of alternative media which will increase the number of program choices available to the public" (FCC App. C at 165). Specifically, the rules were designed to prevent program "siphoning". Siphoning occurs when a pay cable television system or network purchases exclusive exhibition rights to a popular program, thereby preventing its showing on conventional

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[2] The court below also ruled that the FCC followed improper procedures by allowing *ex parte* contacts with the Commissioners and the Commission staff during the pendency of the informal rulemaking procedure. The court ordered the Commission to conduct a hearing to determine the nature and source of all *ex parte* contacts and conditioned its affirmation of the STV rules pending resolution of that proceeding (FCC App. A at 92-108). Petitioner considers the court's ruling erroneous and believes that it should be reviewed by this Court. However, Petitioner defers to the Commission's presentation on this point in its Petition for Writ of Certiorari, filed June 3, 1977 (at 28-43).

broadcast television. A program which has been siphoned can be viewed only by those persons who subscribe to cable television and pay an additional per-program or per-channel fee for reception of the pay programming in addition to the broadcast stations retransmitted by cable systems.[3] Additional rules were designed to insure that pay cable programming enhanced program diversity for those viewers who subscribed to pay cable. Although rules applicable to pay cable television were set aside, identical rules applicable to *broadcast* or over-the-air pay television were upheld by the court.

The Commission has long recognized pay television's "important role . . . in our national telecommunications structure" (FCC App. C at 165). The Commission first determined to authorize permanent broadcast pay television (STV) in 1968. *Fourth Report and Order on Subscription Television,* 15 F.C.C. 2d 466 (1968). At the same time, the Commission adopted rules to prevent siphoning of popular types of programs from free broadcast television to pay television. Adoption of the "anti-siphoning" rules reflected the Commission's concern that siphoning would deprive those who could not afford to subscribe to pay television of the opportunity to view popular programs which they expected to see when they purchased a television receiver. Because the Commission's extensive inquiries into STV had revealed that feature films and sports, already

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[3] Cable television systems also may originate non-broadcast programs as part of their basic cable service. As of September 1, 1976, 727 of the 3,715 operating cable systems were originating non-automated programs other than those for which a per-program or per-channel is made. *Television Factbook,* Services Volume, No. 46 (1977) at 75a.

among the most popular fare on free broadcast television, were the most attractive types of pay television programming, the Commission adopted rules to prevent siphoning of sports and feature film programming from free television to STV. To insure STV programs offered some diversity vis-a-vis free broadcast television programming, the Commission also prohibited exhibition of series programs and advertising during STV programs and limited to ninety percent the amount of STV program time that could consist of sports and feature films. In *National Association of Theatre Owners* v. *FCC*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970) [hereinafter cited as *NATO*], the court affirmed the Commission's authority to authorize STV, the specific "anti-siphoning" rules and other program restrictions.

In 1972, the sports anti-siphoning rule applicable to STV was slightly modified. *Report and Order* in Docket 18893, 34 F.C.C. 2d 271 (1972). The STV "anti-siphoning" rules were modified further so as to accord with the pay cable anti-siphoning rules in the same order in which the Commission adopted the pay cable program restrictions vacated by the court below.

The Commission's initial concern with cable television as other than a broadcast signal retransmission service was evidenced in 1968 with the commencement of a broad ranging inquiry. *Notice of Proposed Rule Making and Notice of Inquiry* in Docket 18397, 15 F.C.C. 2d 417 (1968). The Commission's first action in that proceeding was the adoption of a rule requiring certain cable systems to originate programming. However, the commencement of mandated origination programming was not thought to produce any threat of siphoning, and the Commission decided against adopt-

ing anti-siphoning rules or other program restrictions similar to those applicable to STV. *First Report and Order* in Docket No. 18397, 20 F.C.C. 2d 201 (1969).

Upon reconsideration of the *First Report and Order* in Docket No. 18397, the FCC did adopt anti-siphoning rules applicable to pay cable television. The rules did not apply to all cable origination programming, but only to programming which could be viewed upon payment of a per-program or per-channel charge. The Commission found that pay cable presented the same threat as STV, namely the siphoning of programs away from free television in favor of a service limited to those who could pay. Furthermore, the Commission determined that siphoning from free television to pay cable would be even more detrimental to the public's ability to continue to view popular program types without direct charge on free broadcast television. Exclusive pay cable exhibition would deprive not only those unable to afford to pay direct charges for programming, but also those living in areas not served by cable of the opportunity to view siphoned programs. Consequently, the Commission applied rules identical to those applicable to STV to pay cable. *Memorandum Opinion and Order* in Docket No. 18397, 23 F.C.C. 2d 825 (1970).

The rules adopted in the *First Report and Order* in Docket 18397 requiring certain cable systems which retransmitted broadcast signals to originate programming were upheld by this Court in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972). The Court did not consider the anti-siphoning rules. 406 U.S. at 657, n. 14.

The FCC subsequently denied reconsideration of its order adopting the pay cable and anti-siphoning rules. At the same time, however, the Commission initiated a proceeding to consider possible amendments of the STV and pay cable rules. *Notice of Proposed Rulemaking* [*sic*] *and Memorandum Opinion and Order* in Docket 19554, 35 F.C.C. 893 (1972). The Commission expressed concern as to "how pay cablecasting can best be regulated to provide a beneficial supplement to over-the-air broadcasting without at the same time undermining the continued operation of that free television service." *Id.* at 898. The Commission amassed a substantial record, which was updated and augmented by a second round of comments and two oral arguments. (See FCC App. C at 130).

In the Commission's *First Report and Order,* 52 F.C.C. 2d 1 (1975) (FCC App. C at 123-204), anti-siphoning rules and other program restrictions applicable to pay cable were retained, but amended. The STV rules were amended so as to make uniform the STV and pay cable anti-siphoning rules.

The Commission relaxed the feature film anti-siphoning rules in several respects. The rule permitting pay cable exhibition of feature films during the first two years following general theatrical release was amended to provide a three year rather than a two year exhibition period. The rule permitting pay cable exhibition of a limited number of feature films over ten years old annually was amended to permit unlimited pay cable exhibition of such older feature films provided they had not been shown on broadcast television in the cable system's market for three years prior to the proposed pay cable exhibition. A new category of films available

for pay exhibition was created. Any feature film contractually available for showing on free broadcast television also was available for pay cable exhibition. All restrictions on pay cable exhibition of foreign language films were deleted. The Commission also indicated that it would waive the remaining restrictions for feature films which would not in any case be shown on free broadcast television (FCC App. at 171-179).

The sports anti-siphoning rules applicable to pay cable also were amended, but they continued to distinguish between specific (e.g., Super Bowl) and non-specific (e.g., regular season NFL games) events. The existing STV rule governing exhibition of specific events was retained and applied to pay cable. The rule prohibits pay cable exhibition of a specific sports event which had been broadcast on free television in any one of the preceding five years. The previous rule had prohibited pay cable exhibition only if the events had been broadcast on free television during each of the two preceding years. Non-specific events were categorized (preseason versus regular season [including play-offs] and home versus away) and formulae were established permitting pay cable exhibition of a certain number of events in each category depending on the number of games broadcast on free television during each of the preceding five seasons (FCC App. C at 179-187).

The series anti-siphoning rule was relaxed (FCC App. C at 187-188) and, subsequently, deleted (FCC App. E at 219-234). Finally, the FCC retained rules prohibiting advertising during pay cable programming and limiting to ninety percent the percentage of pay cablecast hours which could consist of sports and feature film programming (FCC App. C at 188).

Broadcast and pay cable television parties petitioned the court below to review the Commission's orders retaining and amending the rules and deleting the series anti-siphoning rule. On March 25, 1977, the Court of Appeals entered a judgment vacating the anti-siphoning rules and other program restrictions applicable to pay cable television. The court held that (1) the Commission lacked authority to adopt the rules and that even if it had the authority, the rules were highly capricious because the record evidence failed to support the need for regulation; (2) the rules were inconsistent with the First Amendment; and (3) the Commission and its staff had made *ex parte* contacts with parties to the rulemaking violating fundamental notions of judicial review and due process. The court upheld the rules applicable to STV, pending completion of a hearing it ordered the Commission to conduct within 120 days regarding the effects of the *ex parte* contacts on the rulemaking process. Lastly, the court ordered the Commission to terminate its proceeding regarding program exclusivity within 180 days.

On April 18, 1977, the FCC filed a motion for partial stay of mandate. The Commission sought no stay of the mandate insofar as it vacated the feature film anti-siphoning rules and asked the court to remand the STV feature film rule to enable the Commission to revoke it. The Commission also sought a stay of the mandate insofar as it required it to conduct a hearing into *ex parte* contacts. The NAB and American Broadcasting Companies, Inc. (ABC) moved for a complete stay of the mandate. National Subscription Television (NSTV) moved for leave to intervene and file a petition for rehearing and suggestion for rehearing *en banc.*

On May 4, 1977, the court issued its order staying its mandate for 30 days insofar as it vacated the sports anti-siphoning rules and other program restrictions applicable to pay cable television and required the Commission to conduct a hearing into the *ex parte* contacts. The court remanded the STV rule to the Commission to permit repeal of the rule. Except to the extent granted by its previous actions, the court denied all other motions, including those of NAB, ABC, and NSTV.

The FCC filed a petition for a writ of certiorari with this Court on June 3, 1977.

REASONS FOR GRANTING THE WRIT

The decision of the lower court seriously impairs the ability of the FCC to fulfill its statutory responsibilities in preserving the present nationwide, advertiser-supported system of free television and raises questions of far-reaching legal and practical importance. The lower court's holding that the FCC lacked jurisdiction to adopt anti-siphoning rules applicable to cable television is contrary to other decisions of the same court and to the decisions of other circuits and this Court. Certiorari is also needed for this Court to consider the lower court's ruling that the pay cable rules violate the First Amendment, a ruling which is in conflict with decisions of other circuit courts, including the District of Columbia Circuit. The decision is of significance to the manner in which informal rulemaking proceedings are to be conducted by administrative agencies because of the improper standard of review applied by the lower court which deprives the Commission of discretion to plan in advance of fore-

seeable events. In sum, the potential impact of the decision below upon the administration of the Communications Act and the preservation of the public's ability to receive popular programming now provided by conventional television at no direct cost, merit further review of the lower court's decision by this Court.

I.

The Lower Court's Decision Seriously Impairs the Ability of the FCC to Fulfill Its Statutory Responsibilities

The Communications Act of 1934, as amended, 47 U.S.C. §§ 151, *et seq.*, establishes the various responsibilities of the Federal Communications Commission. The underlying purpose of all Commission regulation, as set out in Section 1 of the Act, 47 U.S.C. § 151, is "to make available, so far as possible, to all the people of the United State a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges . . ." Among the Commission's specific statutory responsibilities is "the distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. § 307(b). The Act also directs the Commission to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more efficient use of radio in the public interest." 47 U.S.C. § 303(g).

Fullfillment of the FCC's statutory mandate demands "the creation of a system of local broadcasting

stations, such that all communities of appreciable size [will] have at least one television station as an outlet for local self-expression," and Congress has "charged [the Commission] with broad responsibilities for the orderly development of an appropriate system of local television broadcasting." *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 174, 177 (1968). This Court has recognized that "[t]he significance of the Commission's efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information *and entertainment* for a great part of the Nation's population." *Id.*, 392 U.S. at 177.

Congress also has mandated that the FCC "maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission," *FCC* v. *Pottsville Broadcasting Company*, 309 U.S. 134 (1940), and, thus, conferred on the Commission "unified jurisdiction" and "broad authority." *Southwestern Cable Co., supra*, 392 U.S. at 172. The Commission's powers are "not niggardly, but expansive" and its mandate is "comprehensive". *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219 (1943).

Consequently, this Court has held that regulation of cable television falls within the Commission's jurisdiction over "all interstate . . . communication by wire or radio." 47 U.S.C. § 152(a). *Southwestern Cable Co., supra*, 392 U.S. at 177. Regulation of distant signal importation was considered necessary to insure that the public was not deprived of "the various benefits of a system of local broadcasting stations." *Id.* at 176. For similar reasons, restrictions on STV programming also have been accorded judicial affirmation. *NATO,*

supra. Again recognizing that the "critical question" was "adverse impact on free television," the court upheld restrictions designed to protect the interests of the "millions of viewers" who expect free television service and rely on that service for entertainment. *Id.* at 197.

The decision of the court below severly circumscribes the FCC's authority, thereby impairing the Commission's ability to protect and promote valid public interests in the continuation of free broadcast service pursuant to its statutory mandate. First, the court's holding that the Commission lacked jurisdiction to regulate pay cable television in a manner identical to its regulation of STV when pay cable presents the same threat of adverse effects on free broadcast television prevents the Commission from achieving the significant objectives recognized in *Southwestern Cable Co., supra,* and *NATO, supra.* Second, the court's insistence that regulation is necessary only when existing harm is clear prevents the Commission from anticipating foreseeable future developments in the dynamic rapidly evolving area of electronic communications. Finally, in erecting more substantial First Amendment obstacles to regulation of cable television, the court creates an illogical disparity in the Commission's regulatory treatment of cable and broadcast television.[4] The court's decision thus prevents the Commission

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[4] In *National Association of Regulatory Utility Commissioners* v. *Federal Communications Commission,* 533 F.2d 601, 616 (D.C. Cir. 1976), the lower court stated: "It was logical for the FCC to regulate the new business, *i.e.*, the programming to be originated by cable companies, because that business was directly competitive with services which it already regulated."

from exercising its "broad authority" and "unified jurisdiction" to fulfill its mandate to insure that the "all the people of the United States," 47 U.S.C. § 151, are not deprived of the benefits of local broadcast service, including the free entertainment programming they expect and rely on nationwide broadcast television to provide.

This Court has considered establishment of the scope and nature of the Commission's jurisdiction over cable television a matter of considerable importance. The present case involves questions that are as crucial to the Commission's basic statutory responsibilities as those considered by this Court in *Southwestern Cable Co.* and *Midwest Video Corp.* Therefore, certiorari should be granted.

II.

The Lower Court's Holding That the Commission Lacked Jurisdiction to Adopt Anti-Siphoning Rules Applicable to Cable Television Conflicts With Prior Decsions of This Court and the Lower Ccurt Itself.

The court's holding that the Commission lacked jurisdiction to adopt rules to prevent siphoning clashes with the decisions of this Court in *United States* v. *Southwestern Cable Co., supra,* and *United States* v. *Midwest Video Corp., supra,* as well as with its own decision in *NATO, supra.* The decisions of this Court in *Southwestern* and *Midwest* firmly establish that the FCC's authority to regulate cable television extends to that "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Southwestern Cable Co., supra,* 392 U.S. at 178

That grant of authority empowers the Commission to adopt rules and regulations applicable to cable systems, provided such rules or regulations protect or promote "the objectives for which the Commission had been assigned jurisdiction over broadcasting." *Midwest Video Corp., supra,* 406 U.S. at 667. Thus, in *Southwestern,* this Court affirmed rules designed to "integrate the CATV service into the national television structure in such a way as to promote maximum television service to all the people of the United States . . . both those who are cable viewers and those dependent on off-the-air service" *Second Report and Order,* 2 F.C.C. 2d 725, 745-746 (1966) *cited in Midwest Video Corp., supra,* 406 U.S. at 666. The rules promoted the Commission's statutory directive to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges," 47 U.S.C. § 151, and "to encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g). The origination rule in *Midwest* was affirmed, albeit by the narrowest margin, because it "[furthered] the achievement of long established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services . . ." *First Report and Order,* 20 F.C.C. 2d 201, 202 (1969), *cited in Midwest Video Corporation, supra,* 406 U.S. at 668.

The court below held that the FCC lacked jurisdiction to adopt the pay cable anti-siphoning rules because "the Commission failed to demonstrate that the

objectives to be achieved by regulating cable television are also objectives for which the Commission could legitimately regulate the broadcast media" (FCC App. at 56). In so holding, however, the court below failed to recognize that the Commission adopted the pay cable rules to achieve the *same* objectives the STV rules were designed to achieve. Indeed, the lower court itself approved regulation of STV in furtherance of those objectives in *NATO, supra.* Having "concluded that subscription television would provide a 'beneficial supplement' to conventional 'free' broadcasts" and having considered "the critical question of whether STV would have substantial adverse impact on free television," the Commission was found to have "acted reasonably and within the scope of its authority, both in making its initial decision to authorize permanent nation-wide STV and in imposing specific regulations governing subscription television." *NATO, supra,* 420 F. 2d at 197-198. The Commission's specific restrictions on STV programming reflected primarily its concern that "the programs, audiences, and talent would be diverted ('siphoned') from free television to STV," thereby frustrating "the expectation of free service" held "by millions of viewers who rely on that free service for free entertainment." *Id.,* 420 F.2d at 197. Having given "full and fair consideration to the potential impact of STV on poor people and free television,"[5] the Commission adopted reasonable rules to "prevent the more popular kinds of free programs from migrating to subscription television."[6]

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[5] *NATO, supra,* 420 F.2d at 207.

[6] *Id.,* 420 F.2d at 206.

The FCC took the same overall approach to pay cable regulation and adopted regulations designed to prevent the same harm to the public interest. The Commission pointed out that the "fundamental issue" in both cases "is whether subscription television would provide a beneficial supplement to the program choices now available to the public . . . or whether it would impair [free television's] capacity . . . to provide advertiser financed programming of the present or foreseeable quantity and quality, free of direct charge to the public" (FCC App. C at 164-165). In terms of the specific pay-cable anti-siphoning rules which are identical to the amended STV anti-siphoning rules, the Commission acted in response to "the same threat of siphoning"[7] and to prevent the same adverse effects on "poor people"[8] and those who "cannot afford to pay for television."[9] The Commission acted in the "interests of the entire public" to "maintain the public's ability to receive the informational and entertainment programming now provided by conventional television at no direct cost" (FCC App. C. at 165). In short, the Commission recognized that pay cable posed the same threat of impairment to free broadcast television service as STV and acted in a virtually identical manner to achieve the identical statutory objectives approved by the court in *NATO*.

Regarding the advertising prohibition and ninety percent limitation on feature films and sports, this Court has recognized that the Commission's "various

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[7] *Memorandum Opinion and Order*, 23 F.C.C. 2d 825, 828 (1970).

[8] *NATO, supra*, 420 F.2d at 207.

[9] *Memorandum Opinion and Order*, 23 F.C.C. 2d 825, 828 (1970).

responsibilities for the regulation of television broadcasting . . . are considerably more numerous than simply assuring that broadcast stations operating in the public interest do not go out of business." *Midwest Video Corp., supra,* 406 U.S. at 664. "Augmenting the public choice of programs and types of services" are "plainly within the Commission's mandate for the regulation of television broadcasting." *Id.,* 406 U.S. at 668; *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943). The rules further this latter goal by requiring development of pay cable's "potential to expand the public's program choices to supplement the programming now provided by conventional television" (FCC App. at 165). Like the mandatory origination requirement upheld in *Midwest,* the ninety percent and advertising rules "assure that in the retransmission of broadcast signals, viewers are provided suitably diversified programming." 406 U.S. at 669. Therefore, the anti-siphoning rules, the ninety percent limitation on pay cable sports and feature films and the prohibition against advertising on pay cable further objectives for which the Commission properly can and has regulated broadcasting.

The Commission has sought to regulate pay cable to achieve the same objectives for which it has regulated STV—objectives recognized and approved by the lower court in *NATO* and by this Court in *Midwest.* Thus, in holding that the anti-siphoning rules and other program restrictions applicable to pay cable did not further objectives for which the Commission could regulate broadcasting, the court below squarely contradicted its prior decision in *NATO.* Furthermore, because the pay cable rules were designed to further objectives for which the Commission properly could and

did adopt regulations applicable to broadcasting, the lower court's holding that the Commission lacked jurisdiction to adopt the rules conflicts with the decisions of this Court in *Southwestern* and *Midwest*.

III.

The Lower Court Improperly Substituted Its Judgment for That of the Commission and Applied a Standard of Review Which Conflicts With Prior Supreme Court and Appellate Court Decisions.

The court below usurped the Commission's policy-making role in informal rulemaking proceedings in a manner inconsistent with its proper review function and applicable decisions of this Court. The lower court conducted its own review of the record, analyzing and evaluating every minute detail and reached its own conclusions as to the probity of the record evidence. After applying a standard of review far more stringent and demanding than considered necessary or even desirable by this Court, it concluded that the Commission's actions were arbitrary and capricious.

Although the court paid lip service to the proper scope of judicial review of informal rulemaking proceedings, pursuant to the arbitrary and capricious standard of 5 U.S.C. § 706(2)(A) (FCC App. A at 56-60), it, nonetheless, plunged headlong into its "own review" of the record (FCC App. A at 62) and determined that evidence offered by proponents of the rule had not "proved their case" (*id.* at 64), and overall that the record failed to provide a "clear picture as to the effects of subscription television upon conventional broadcasting." (*Id.* at 61). The court then concluded that the pay cable anti-siphoning rules were highly capricious because "a regulation perfectly reasonable

and appropriate in the face of a given problem may be highly capricious if that problem does not exist." *City of Chicago* v. *Federal Power Commission,* 458 F. 2d 731 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972) (FCC App. A at 60).

The court below usurped the Commission's role as an expert agency and substituted its judgment for the Commission's. The function of a reviewing court, however, is not to conduct its own review of the record and reach its own judgment. This Court has stated that a reviewing court must not "weigh the evidence introduced before the Commission" or "inquire into the wisdom of the regulations that the Commission promulgates." *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742, 749 (1972). The reviewing court should not place itself in the Commission's position, reach its own judgment and "substitute its own judgment for that of the agency." *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 416 (1971).

The necessity of reserving complex policy judgments to expert agencies rather than the courts is amply illustrated by the lower court's decision. For example, the court's difficulties with the Commission's assumption "that siphoning would lead to a loss of film and sports programming for audiences not served by cable systems or too poor to subscribe to pay cable," (FCC App. A at 66) rests on a total misconception of the facts. The court considered it "more consistent with economic theory" to assume that cable operators would sell broadcast rights to broadcasters "in areas that cable firms do not reach" (FCC App. A at 66). The court's analysis, however, fails to consider that the vast

majority of cable systems are located within the coverage areas of conventional broadcast television stations and, consequently, that cable and broadcast television serve the same, rather than separate and distinct geographical areas. Programs will not be sold for broadcast showing in markets in which cable systems also operate. As the court itself recognized, a program sold for pay cable exhibition would not be marketable if it also were available without charge on a broadcast television station which pay cable subscribers could receive. Because cable systems are operating in nearly all broadcast markets, programs sold for pay cable exhibition will not be sold for broadcast showing. Consequently, viewers in those markets who have no access to cable service or who are unable to afford to subscribe to basic cable or pay cable will be deprived of the ability to see the shows. Obviously, the court should have left analysis and evaluation to the expert agency and simply satisfied itself that there existed a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962).

Furthermore, in determining whether a need for regulation existed, the court below applied a standard of review wholly inconsistent with the views of this Court regarding the Commission's responsibility to take regulatory measures to prevent harm to the public before it occurs. This Court has not demanded proof of existing harm or a clear picture that a problem existed. In *Southwestern, supra,* this Court reviewed Commission rules governing broadcast signal carriage by cable television systems. In adopting those rules "[t]he Commission acknowledged that it could not 'measure precisely the degree of . . . impact," but found

that "CATV competition can have a substantial negative effect upon station audience and revenues . . ." [citation omitted]. 392 U.S. at 165. This Court affirmed the Commission's regulations, noting the "uncertainty" surrounding predictions of the actual impact of CATV, but emphasizing the Commission's "statutory responsibilities demand that it 'plan in advance of foreseeable events instead of waiting to react to them.' " 392 U.S. at 177. The Commission adopted the pay cable anti-siphoning rules with the same recognition that "[r]emedial action in this area should not wait upon the threat becoming actuality." *Memorandum Opinion and Order,* 23 F.C.C. 2d 825, 828 (1970).

The lower court's decision also is at odds with its prior decision in *NATO.* There, after noting the Commission's "primary emphasis on the *possibility* that programs, audiences and talent could be diverted ('siphoned') from free television to STV," the court held "that the Commission had acted reasonably . . . in imposing specific regulations governing subscription television." 420 F. 2d at 197-198. Notably, in *NATO,* the court required "full and fair consideration to the *potential* impact of STV on poor people and free television," *id.,* 420 F. 2d at 207, not a clear showing of existing harm. Moreover, the rules affirmed in *NATO* were more restrictive than the ones considered by the lower court in its *Home Box Office* opinion and were reviewed at a time when no STV stations were in operation.

The lower court's demands for proof of harm would have restrained an attempt to move Mrs. O'Leary's lantern a safe distance from her cow. The court would have the agency wait until Chicago was ablaze before

acting to "prevent" harm. This is not the approach found necessary and appropriate by this Court in *Southwestern;* nor is it the proper approach for any agency upon which Congress has confirmed "unified jurisdiction" and "broad authority" to "maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." *Southwestern Cable Co., supra,* 392 U.S. at 172-3.

IV.

The Lower Court's Decision Conflicts With Various Appellate Court Decisions Regarding the First Amendment Rights of Cable Television Systems and With This and Other Courts' Decisions Regarding the Commission's Authority to Impose Content Regulation on Cable Origination Programming.

The lower court's ruling that the pay cable program restrictions were inconsistent with the First Amendment is premised on its holding that "differences between cable and broadcast television" require application of different First Amendment standards (FCC App. A at 75). The court distinguished broadcast television and cable television which uses broadcast signals on the ground that "physical interference and scarcity" resulting from broadcasting's use of spectrum were absent in the case of cable television (FCC App. A at 78). Thus, the court erected a higher First Amnedment hurdle to confront regulations applicable to cable television systems which retransmit broadcast signals.

The court's distinction between broadcast and cable television conflicts with this Court's view that cable systems which retransmit broadcast signals may be subjected to FCC regulation—including regulation of cablecast or cable origination programming. Although

the regulations upheld in *Southwestern* applied only to carriage of broadcast television signals by cable television systems, this Court's decision in *Midwest* leaves no doubt that regulation of cable origination (or cablecast) programming, which requires no use of the broadcast spectrum, is "not the less, for that reason, reasonably ancillary to the Commission's jurisdiction over broadcast services." 406 U.S. at 669. Despite the narrow margin by which the mandatory origination requirement was upheld in *Midwest,* the Court appeared unanimous in recognizing that the Commission could regulate cable origination programming once a cable system retransmitting broadcast signals decided to begin originating its own programming. In his concurring opinion, the Chief Justice stated that:

> Those who exploit the existing broadcast signals for private commercial surface transmission by CATV—to which they make no contribution—are not exactly strangers to the stream of broadcasting. The essence of the matter is that when they interrupt the signal and put it to their own use for profit, they take on burdens, one of which is regulation by the Commission.

406 U.S. at 676. Nor did the four dissenting Justices question the Commission's authority to regulate cable origination programming:

> The fact that the *Commission has authority to regulate origination of programs* if CATV decides to enter the field does not mean that it can compel CATV to originate programs.

406 U.S. at 680. [Emphasis supplied.]

The plurality opinion in *Midwest* also recognizes the Commission's authority to regulate the "content of the

programming offered" by cable television systems. 406 U.S. at 669-670. Thus, this Court appears to accord comparable regulatory treatment to broadcasters and cable operators who intermix carriage of broadcast signals and cablecast programming. The court below has taken the conflicting position that cablecast programming should not be regulated on the same basis as broadcast programming.

The court's application of a more stringent First Amendment standard to cable television regulation directly conflicts with decisions in other circuits. Decisions of other circuits have recognized that Commission regulation of cable television systems which retransmit broadcast signals "have the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television station." *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65, 69 (8th Cir. 1968). Although cable television systems "do not themselves use the airways in their distribution system," the court found the "crucial" consideration to be cable's use of broadcast signals and its "unique impact upon, and relationship with television broadcast service." *Id.* In *Buckeye Cablevision, Inc.* v. *FCC*, 387 F. 2d 220, 225 (D.C. Cir. 1967), the court concluded that although "CATV systems disseminate programs carrying a wide range of information," restraints designed to "effectuate the public interest requirements of the Act" did not constitute an "illegal restraint on First Amendment rights." In *Conley Electronics Corporation* v. *FCC*, 394 F. 2d 620, 624 (10th Cir.), *cert. denied*, 383 U.S. 858 (1968), the court ruled arguments asserting abridgement of cable systems' First Amendment rights

were "without merit" where "reasonable regulation in the public interest is involved."

The court's ruling in *Conley Electronics Corporation, supra,* is especially significant because it undermines the lower court's attempt to explain away the conflict between its holding and those in *Black Hills Video Corporation, Buckeye Television, Inc.* and their kin. The court gave little weight to the *Black Hills* and *Buckeye Cablevision, Inc.* decisions in the belief they "incorrectly" neglected the distinction between licensing of microwave facilities utilized by cable systems and direct regulation of the cable systems themselves (FCC App. A at 78-79, n. 80). In *Conley Electronics Corporation,* the court responded directly to arguments seeking to distinguish earlier cases "on the ground that they were concerned with licensing rather than with the direct regulation of CATV systems," holding the cases "indistinguishable." 394 F.2d at 624.

The pay cable rules would have passed First Amendment muster had the court below properly ascribed to cable operators utilizing broadcast signals "the same constitutional status [as broadcasters] under the First Amendment." *Black Hills Video Corporation, supra,* 399 F.2d at 69.[10] As the lower court pointed out, it previously had upheld "more stringent but substantially similar rules" applicable to STV against First Amendment objection in *NATO, supra* (FCC App. A at 75). The pay cable restrictions were adopted for the same purpose of preventing loss of free, popular pro-

[10] The rules applied only to cable systems which retransmitted broadcast signals. The Commission, in fact, defines a cable system as "a nonbroadcast facility . . . that distributes or is designed to distribute . . . the signals of television broadcast stations . . ." 47 C.F.R. § 76.5(a).

gramming to the public and enhancing program diversity for pay television subscribers and, thus, constitute "reasonable regulation in the public interest." *Conley Electronics Corporation, supra,* 394 F.2d at 624.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1976

No. 76-1842

NATIONAL ASSOCIATION OF BROADCASTERS, *Petitioner,*

v.

HOME BOX OFFICE, INC., *et al, Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

CASES: Page

National Association of Theatre Owners v. *Federal Communications Commission*, 420 F.2d 194 (1969), *cert. denied*, 395 U.S. 922 (1970) 6, 7

TelePrompTer Corporation v. *Columbia Broadcasting System*, 415 U.S. 394 (1974) 8

United States v. *Midwest Video Corp.*, 406 U.S. 649 (1972) 5

United States v. *Southwestern Cable Co.*, 392 U.S. 157 (1968) 4, 5

STATUTES:

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 ..... 2, 4

Pub. L. 94-553, Section 111, 90 Stat. 2550-2558 4

FCC ORDERS:

First Report and Order in Docket Nos. 19554 and 18893, 52 F.C.C. 2d 1 (1975) 3

MISCELLANEOUS:

Pay TV Newsletter, September 20, 1977 ..... 2, 3

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PETITIONER'S REPLY BRIEF

The National Association of Broadcasters (NAB) hereby replies to the oppositions of respondents Home Box Office, Inc., *et al.* (Home Box Office), Columbia Pictures Industries, Inc., *et al.* (Columbia), National Citizens Committee for Broadcasting (NCCB), and United States (U.S.).

Respondents have sought to obscure the real and fundamental public interest issues arising from the development and expansion of pay cable television service. Like the court below, respondents mischaracterize the nature of broadcast-pay cable competition as well as the purpose and effect of the pay cable program

restrictions adopted by the Federal Communications Commission (Commission). Consequently, respondents and the court below have embraced untenable legal conclusions and arguments and certiorari should be granted.

I.

The issue in this case is not whether an infant industry, struggling to provide a new and diverse program service to the American public should be stifled by arbitrary protectionist regulation designed to insulate entrenched broadcast interests from fair competition in the marketplace. (Home Box Office Brief at 4). Nor is it merely the adequacy of the record. (U.S. Brief at 11-12).

The real issue is whether a pay television service subsidized by cable television's privileged use of broadcast signals and incapable of providing service "to all the people of the United States," 47 U.S.C. § 151, should be permitted to develop in the absence of regulatory safeguards designed to insure that those viewers for whom pay cable service is either unavailable or unaffordable are not deprived of the quantity or quality of broadcast program service now available to all viewers without direct charge.

The rules in question were neither designed nor intended to protect broadcasters by inhibiting a competitive service offered by an emerging, infant technology. Pay cable television has left its infancy and now is an established, successful and growing communications industry.[1] Since 1975, when the pay cable program re-

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[1] A recent article notes that Home Box Office "is heading into a new TV season with its key executives firmly in place, its programming plan solidified and profits instead of red ink." PAY TV NEWSLETTER, September 20, 1977, at 1.

strictions were adopted, the number of pay cable subscribers has increased from 100,000[2] to 1,173,863, and pay cable service is available to 10,779,029 homes passed by cable systems which provide pay programming.[3] In view of pay cable's rapid growth, pay cable development hardly appears to have been stifled by the FCC's program restrictions. However, even the court below recognized that pay cable never will be a universal service.[4] Therefore, regulation was considered necessary not to protect broadcasters, but to protect the interests of the majority of television viewers to whom pay cable television is not and probably never will be available or affordable.

Furthermore, the rules are not anti-competitive. They are no more than appropriate adjustments justified by pay cable's advantageous competitive posture. Broadcast-pay cable competition hardly resembles normal marketplace competition. But for broadcast television, the type of pay cable television operation subject to the program restrictions would not exist. Pay cable programming is distributed via an otherwise unused, excess channel available on a cable system. The marginal cost of using that channel for distribution is zero because the cable is in place and paid for by cable subscribers' fees for basic service. That basic service is, of course, retransmission of broadcast signals. Cable systems presently pay nothing for use of the broadcast programming distributed on these channels and will pay only token copyright fees under a compulsory

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[2] *First Report and Order*, Docket Nos. 19554 and 18893, 52 F.C.C.2d 1, 2 (1975).

[3] PAY TV NEWSLETTER, September 20, 1977, at 3.

[4] FCC App. A at 34-35.

license scheme which goes into effect on January 1, 1978.[5] Only through their reliance on broadcast signals can they offer pay cable service in competition with broadcast services. This is not a normal competitive situation. Free and fair competition would exist only where a cable system provides pay cable service without the benefit derived from retransmission of broadcast signals. In such a case, the program restrictions would not be applicable.

This Court has recognized that broadcasting is "demonstrably a principal source of information and entertainment" for most of the people of this country [6] and that cable television services, which are not available "to all the people of the United States" 47 U.S.C. § 151, should be subject to regulation in order to prevent any diminution of the present or potential benefits which the broadcast service provides or will provide to all television viewers.[7] Respondents and the court below have failed to come to grips with this fundamental issue. Consequently, the court erroneously denied the Commission authority to take appropriate regulatory steps to prevent this public interest harm and erected inapplicable constitutional barriers to adoption of proper regulatory measures.

II.

When pay cable television is provided in conjunction with cable retransmission of broadcast signals, the

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[5] Pub. L. 94-553, Section 111, 90 Stat. 2550-2558.

[6] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).

[7] *Id.* at 175, n. 43.

Commission's regulatory authority as recognized and delineated by this Court in *Southwestern Cable Co., supra,* and *Midwest Video Corp.*,[8] is undeniable. Therefore, the inconsistency of the opinion below with the *Southwestern* and *Midwest* decisions is stark and glaring.

In *Southwestern* this Court recognized the Commission's fundamental responsibility to develop and maintain a nationwide television broadcast service and affirmed the Commission's regulation of cable retransmission services available only to a few viewers for the purpose of preserving the benefits of the universally available, nationwide broadcast service for all viewers.[9] Noting that the Commission's responsibility went beyond assuring that broadcast stations remained on-the-air, this Court in *Midwest* held that the Commission had authority to require cable systems which retransmitted broadcast signals to originate programming for the purpose of enhancing the diversity of programs available to cable subscribers.[10] The pay cable program restrictions adopted shortly after adoption of the origination requirement served the same basic purpose as the regulations approved in *Southwestern.* They, too, were designed to insure that the service available to all the people was not diminished as a result of cable systems' providing additional services to small groups of viewers. They, too, preserve the existing program diversity for all viewers while encouraging meaningful diversity (i.e. something more than the same types of programs available on broadcast

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[8] *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972).

[9] 392 U.S. at 177.

[10] *Midwest Video, supra,* 406 U.S. at 664.

television without commercials) in pay cable programming. A finding that the Commission may regulate one aspect of cable service which jeopardizes fulfillment of its statutory obligations to maintain the nationwide, universally available broadcast service, but not another is arbitrary and senseless.

Respondents also concur with the court below in its erroneous view that the Commission lacks authority to adopt pay cable program restrictions because it is asserting authority which exceeds its authority over broadcasting.[11] Respondents' position completely ignores the fact the Commission does regulate broadcasting for the same purposes for which it regulates pay cable. (NAB Petition at 17).

III.

The irony of respondents' claims to First Amendment rights is striking because what they really claim is the right to deprive the majority of television viewers of access to their product in order to secure more substantial economic rewards from exhibiting it to the remaining few. Program restrictions applicable to over-the-air pay television (STV), after which the pay cable rules were patterned, were designed to prevent this deprivation to the entire public and, thus, were found to produce "a First Amendment gain" because the viewing public would receive "more rather than less diversity of expression in its television programming."[12] No logical basis exists for concluding that less restric-

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[11] U.S. Brief at 13-14; Home Box Office Brief at 20.

[12] *National Association of Theatre Owners (NATO)* v. *Federal Communications Commission*, 420 F.2d 194 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

tive regulations applicable to pay cable television will produce any other than the same First Amendment gain. Not only do the rules preserve the existing diversity of broadcast programming, but they also tend more to encourage rather than inhibit a diversity of pay cable programs.[13] The pay cable program restrictions dealt only with program types already available to the viewing public on broadcast television, not with any new or diverse program types which actually would have enhanced the diversity of program types available to pay cable subscribers. To the extent the rules might have precluded pay cable exhibition of programs which would not be broadcast on commercial television, the Commission adopted a flexible waiver policy designed to permit pay cable exhibition of such programs which were unsuitable or undesirable for broadcast. Thus, under the pay cable program restrictions, pay cable remained totally unencumbered in any effort to enhance the diversity of program types available to its subscribers.

Thus, the court below erroneously has found a First Amendment violation where a different panel of the same court had found none. *NATO, supra.* Similarly, the pay cable rules were no more "overly broad" than the restrictions applicable to STV upheld by the court below in the instant decision and in *NATO.*

Respondents also lose sight of the nexus between cable retransmission of broadcast signals and the application of the rules. No pay cable exhibitor is subject to any restriction unless the pay cable programming is

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[13] The advertising prohibition and the 90 percent limitation were adopted to insure that pay cable service did not simply mirror broadcast service but for a fee.

exhibited on a cable system which also transmits broadcast signals. The rules hardly constitute an outright restriction, but more closely resemble a condition of cable's privileged use of broadcast signals. Characterizing pay cable as a separate and different operation blinks reality. Whereas this Court saw a logical distinction between retransmission and origination in terms of what constitutes a performance for copyright purposes, it acknowledged that both services were "sold as a package."[14] Respondents attempt to distinguish regulation of origination programming from the requirement to initiate origination ignores this Court's perception that the authority to require origination programming subsumes the authority to regulate voluntarily undertaken origination.[15] Therefore, the lower court's (FCC App. at 80) comparison of cable systems and newspapers vis-a-vis the First Amendment is totally unwarranted and incorrect.

IV.

This Court should not exclude the feature film rules from its review of the decision below as urged by respondents.[1] Review devoid of consideration of the feature film rules would leave the extent of the Commission's authority and the relevant Constitutional boundaries regarding pay cable regulation uncertain. This is undesirable in view of the critical public interests at stake. Although the Commission has not sought review of the feature film restrictions, it has offered no substantial reason for limiting the scope of this Court's review. The Commission's action is unexplained, but

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[14] *TelePrompTer Corp.* v. *Columbia Broadcasting System*, 415 U.S. 394, 405 (1974).

[15] NAB Petition at 24-25.

for one isolated and unenlightening bit of speculation by one Commissioner.

The public interest questions are no less critical in the case the feature film rules. The Commission chose to adopt rules applicable to sports events and feature films not because those program types were *per se* worthy of special treatment. They were selected because they were among the most popular broadcast program types and, moreover, because they were the type of programs most exhibited by pay television services. In short, they were the program types which would be removed from broadcast television to pay cable television. No distinction exists in the rationale underlying the rules nor in the issues presented for review.

Resolution of the issues presented in this case is critical to the Commission's ability to carry out its responsibility to insure that program services available to only a few do not displace or subvert broadcast program services available to all. The public never must be placed in the position of paying for or, at worst, losing popular broadcast program fare now available to all without direct charge. Therefore, comprehensive review of these issues by this Court is absolutely essential to define the Commission's authority to deal effectively with this significant public interest matter.

Respectfully submitted,

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